

STATE OF MINNESOTA
IN COURT OF APPEALS



In the Matter of the Denial of Contested
Case Hearing Requests and Issuance of
National Pollutant Discharge Elimination
System / State Disposal System Permit No.
MN0071013 for the Proposed Northmet
Project St. Louis County Hoyt Lakes and
Babbitt Minnesota.

O R D E R

A19-0112

A19-0118

A19-0124

Considered and decided by Cleary, Chief Judge; Worke, Judge; and Florey, Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

These consolidated certiorari appeals are taken from an order by respondent Minnesota Pollution Control Agency (MPCA) granting a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit to respondent Poly Met Mining, Inc. (PolyMet) for its NorthMet project. Relator WaterLegacy (WL) moves for a transfer to district court, under Minn. Stat. § 14.68 (2018), due to alleged procedural irregularities not shown in the record. Relator Fond du Lac Band of Lake Superior Chippewa has filed a notice of joinder in the motion, and counsel for WL represents that relators Minnesota Center for Environmental Advocacy, Center for Biological Diversity, and Friends of the Boundary Waters Wilderness also support the motion. The MPCA and PolyMet oppose the motion.

A decision granting an NPDES/SDS permit is subject to judicial review under Minn. Stat. §§ 14.63-.69 of the Minnesota Administrative Procedure Act (MAPA). *See* Minn. Stat. § 115.05, subd. 11(1) (2018). Under Minn. Stat. § 14.69, this court

may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

This court's review under MAPA "shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, the court of appeals may transfer the case to the district court in which the agency has its principal office. . . ." Minn. Stat. § 14.68 (2018). In the event of such a transfer, "[t]he district court shall have jurisdiction to take testimony and to hear and determine the alleged irregularities in procedure." *Id.* "In order to determine whether transfer to the district court is appropriate, we will examine the extra record materials to determine whether there is substantial evidence of irregularities." *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. App. 2001).

WL moves to transfer this matter based on allegations that “MPCA’s Commissioner and political leaders at the United States Environmental Protection Agency (EPA) developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review.”

In support of its motion, WL has submitted declarations from its counsel and from a retired Environmental Protection Agency (EPA) attorney, Jeffry Fowley, as well as several documents obtained by WL through government-data requests. In opposition to the motion, the MPCA has submitted declarations from five of its current and former employees.

The declarations, none of which are included in the administrative record, provide undisputed evidence that (1) the MPCA and EPA departed from typical procedures in addressing the NorthMet permit, engaging in multiple telephone conferences and in-person meetings, some of which are not reflected in the administrative record; (2) the EPA prepared written comments on the draft NorthMet permit; (3) those written comments were never submitted to the MPCA and are not part of the administrative record; (4) instead the written comments were read to MPCA during an April 5, 2018 telephone call; and (5) notes taken during that call have not been included in the administrative record, and are believed to have been discarded. In addition, the declarations provide disputed evidence on the

issues of whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA's comments out of the public record.

We conclude that WL has provided substantial evidence of procedural irregularities not shown in the administrative record, and thus that it is appropriate to transfer this matter to district court for a hearing and determination of the alleged irregularities.

The statute requires that this matter be considered by the Ramsey County District Court. *See* Minn. Stat. § 14.68 (transfer to district court for county in which agency has its principal office). The statute creates a special proceeding, for which no summons or complaint is required, and jurisdiction is based on this court's decision. *See id.* (providing for district court proceeding initiated by transfer from appellate court). Because relators raise additional issues for decision by this court, it is appropriate to stay these certiorari appeals while the matter is pending before the district court. The district court's decision determining the procedural irregularities may be appealed as in other civil cases. *See id.* Any appeal from the district court's decision determining irregularities shall be consolidated with these certiorari appeals.

IT IS HEREBY ORDERED:


1. The motion for transfer to district court is granted.
2. This matter is transferred to Ramsey County District Court for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure. The hearing shall be scheduled as soon as practicable. Following the hearing,

the district court shall issue an order that includes findings of fact on the alleged irregularities. Appeal from the district court's order may be taken as in other civil cases.

3. These certiorari appeals are stayed pending further order of this court.
4. Counsel for WL shall file the district court's order with this court within three days of it being filed in the district court.
5. The clerk of the appellate courts shall provide a copy of this order to the district court administrator for the Ramsey County District Court.

Dated: June 25, 2019

BY THE COURT



Edward J. Cleary
Chief Judge

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A19-0112
A19-0118
A19-0124

Considered and decided by Cleary, Chief Judge; Rodenberg, Judge; and Reyes,
Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

These consolidated appeals are taken from an order by respondent Minnesota Pollution Control Agency (MPCA) granting a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit (the permit) to respondent Poly Met Mining, Inc. (PolyMet) for its NorthMet project.

On June 25, 2019, this court issued an order granting relator WaterLegacy's motion for a transfer to district court, pursuant to Minn. Stat. § 14.68 (2018), for hearing and determination of alleged procedural irregularities related to the grant of the permit. That order was based on undisputed extra-record evidence that (1) the MPCA and Environmental Protection Agency departed from typical procedures in addressing the permit, engaging in multiple telephone conferences and in-person meetings, some of which

are not reflected in the administrative record; (2) the EPA prepared written comments on the draft permit; (3) those written comments were never submitted to the MPCA and are not part of the administrative record; (4) instead the written comments were read to MPCA during an April 5, 2018 telephone call; and (5) notes taken during that call have not been included in the administrative record, and are believed to have been discarded. The order was also based on disputed extra-record evidence on the issues of whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA's comments out of the public record. Based on this evidence, this court stayed these appeals and transferred the matter to Ramsey County District Court for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure. The hearing is to be held as soon as practicable, and the district court has scheduled a pre-hearing conference for August 7, 2019.

On July 2, 2019, relators filed a motion to stay the permit, arguing that such relief is warranted by the pendency of the district court proceedings and the imminence of construction on the NorthMet project. The MPCA and PolyMet oppose the motion.

Filing a certiorari appeal from an agency decision does not stay that decision, but the agency or this court may grant a stay. Minn. Stat. § 14.65 (2018). Generally, a party seeking a stay in a certiorari appeal must first request the stay from the agency, and this court reviews that decision for an abuse of discretion. *See* Minn. R. Civ. App. P. 115.03, subd. 2(b); 108.02, subd. 2; *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 143 (Minn. App. 2007). Relators did seek a stay of the permit from the MPCA in December 2018 and do

not challenge the denial of that stay request. Instead, the issue here is whether, in light of subsequent procedural developments in this court, it is appropriate to stay the permit.

When considering a motion to stay, relevant factors may include “whether the appeal raises substantial issues; injury to one or more parties absent a stay; and the public interest, which includes the effective administration of justice.” *Webster v. Hennepin County*, 891 N.W.2d 290, 293 (Minn. 2017). Effective administration of justice includes protecting appellate jurisdiction, avoiding multiple lawsuits, and preventing the defeat of ‘the objects of the writ of error.’” *Id.* (quoting *State v. N. Pac. Ry. Co.*, 22 N.W.2d 569, 574 (Minn. 1946)). A stay motion requires an individualized inquiry into the factors most relevant to the particular case. *Id.*

On the unique facts of this appeal, we conclude that staying the permit is warranted. A substantial issue has been raised as to the regularity of the MPCA’s proceedings in granting the permit, and this court has ordered the exceptional remedy of a transfer to district court to hear and determine those irregularities. And, although the parties dispute the effect of staying the permit on the project as a whole, relators have identified injuries to their environmental interests should the project proceed, and we are cognizant of the “difficulty of stopping a bureaucratic steam roller, once started.” *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 995 (8th Cir. 2011) (holding that “steam roller” effect was proper consideration in determining whether to grant injunctive relief against permit where allegation was that environmental harm would occur through inadequate foresight and deliberation). We are also persuaded that a stay will both promote the public interest and protect this court’s appellate jurisdiction. Accordingly, we conclude that it is

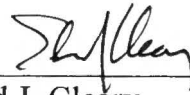
appropriate to stay the permit, at least through the pendency of the district court proceedings.

IT IS HEREBY ORDERED:

1. The motion to stay is granted.
2. The NorthMet NPDES/SDS permit MN0071013 is stayed pending further order of this court.

Dated: August 6, 2019

BY THE COURT

A handwritten signature in black ink, appearing to read 'E. Cleary', is written over a horizontal line.

Edward J. Cleary
Chief Judge